Harding Glass Company, Inc. *and* Glaziers Local 1044, International Brotherhood of Painters & Allied Trades, AFL–CIO. Cases 1–CA–31148 and 1–CA–31158

August 1, 2002

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On March 31, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding[1] in which it ordered the Respondent, Harding Glass Company, Inc., on request of the Union, to restore all terms and conditions of employment to the status quo as they existed on October 23, 1993, and make whole any employees for any losses they suffered as a result of the unilateral changes in terms and conditions of employment, with interest. In addition, the Board ordered the Respondent, on application, to offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993, discharging if necessary any replacements hired on or after October 25, 1993.

On March 27, 1996, the United States Court of Appeals for the First Circuit entered a judgment enforcing the Board's Order, inter alia, directing the Respondent to restore all terms and conditions of employment to the status quo as it existed on October 23, 1993, and to make whole all employees, with interest, for any losses they may have suffered as a result of the unilateral changes in the terms and conditions of employment made by the Respondent in violation of Section 8(a)(1) and (5) of the Act.[2] The circuit court declined to adopt the Board's finding that the economic strike which began on October 18, 1993, was converted to an unfair labor practice strike on October 25, 1993, and, accordingly, denied enforcement to that portion of the Board's Order that required the Respondent to offer immediate and full reinstatement to all those employees who went on strike on October 18, 1993, and were not permanently replaced prior to October 25, 1993.

A controversy having arisen over the amount of backpay due the claimants under the Board's Order, the Regional Director for Region 1 issued a compliance specification and notice of hearing on July 1, 1997. On July 22, 1997, the Respondent filed its answer. Thereafter, on January 20, 2000, the Regional Director for Region 1 issued an amended compliance specification and notice of hearing, and on February 10, 2000, the Respondent filed its answer. The amended compliance specification sets forth backpay formulae and calculations for glassworkers Robert Mosely, David Elworthy, Mark Zaltberg, Christopher Pelletier, Kenneth Bullock, and Christopher Carle, and glaziers James Tritone, James Gabrielle, Richard Poirer, and Richard Von Merta.

On March 10, 2000, the compliance officer for Region 1 advised the Respondent that its answer to the amended compliance specification, in part, failed to meet the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations, and that the General Counsel would file a Motion for Partial Summary Judgment if the Respondent did not file an appropriate amended answer by March 20, 2000. On March 21, 2000, the Respondent filed its first amended answer to the amended compliance specification.

On May 19, 2000, the General Counsel filed with the Board a motion to strike portions of Respondent's first amended answer to the amended compliance specification and for partial summary judgment. On May 23, 2000, the Board issued an order and Notice to Show Cause, transferring the proceeding to the Board and postponing indefinitely the hearing scheduled in this case. On June 6, 2000, the Respondent filed its opposition to the motion to strike and Motion for Partial Summary Judgment. The Respondent generally denies the General Counsel's formulae for computing backpay and the application of those formulae to the claimants. The Respondent also raises several affirmative defenses. The General Counsel argues that the Respondent's answers are substantively deficient under Section 102.56(b) and (c) of the Board's Rules and Regulations and that the Respondent's affirmative defenses are unsupported.

Ruling on Motion to Strike Portions of Respondent's First Amended Answer to the Amended Compliance Specification and for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations state, in pertinent part:

> (b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all

[1] 316 NLRB 985.

[2] *NLRB v. Harding Glass Co.*, No. 95–1727 (unpublished opinion).

matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*–If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The General Counsel contends that the Respondent, in its answer, failed to comply with the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations. We agree except as indicated below. *Baker Electric*, 330 NLRB 521 (2000). The Respondent failed to provide any explanation or figures in its amended answer to the first paragraph in the amended specification to support its claim that Robert Mosely was properly paid. Similarly, in its amended answer to the second paragraph of the amended specification, the Respondent: denied without elaboration that the alleged hourly rates of pay were applicable to the employees; and denied that Elworthy and Pelletier were glassworkers.

In this respect, we note that Section 102.56(b) of the Board's Rules, supra, specifies that as to all matters within the knowledge of a respondent, a general denial shall not be sufficient. Rather, if a respondent disputes the premises on which an allegation is based, the respondent's answer shall specifically state the basis for the respondent's disagreement with the allegation. Further, the answer shall set forth in detail the respondent's position as to the applicable premises.

Elworthy's and Pelletier's job classifications are obviously well within the Respondent's knowledge. Under Section 102.56(b), then, it is not enough for the Respondent generally to *deny*, without more, that Elworthy and Pelletier were glassworkers. To be sufficient under Section 102.56(b), the Respondent's flat denial of the job classifications alleged in the specification must be supported by a counterassertion from the Respondent as to what Elworthy's and Pelletier's job classifications *in fact were*, if not glassworkers. But the Respondent's answer makes no such counterassertion. Nor does it contain a statement of even *the basis* for the Respondent's disagreement with the job classifications alleged in the specification, much less a detailed statement of the Respondent's position as to the applicable premises on which the determination of the job classifications in question *should* be based. Accordingly, the Respondent's answer to the backpay specification in the instant case fails to support its general denials of the alleged job classifications of Elworth and Pelletier with affirmative counterassertions about what their job classifications actually were.[3]

The Respondent also denied the gross backpay formula in its amended answer to the third paragraph of the amended specification, and the actual hours worked by, and the actual hourly rates paid to, the employees in its amended answer to the seventh paragraph of the amended specification. The Respondent provided neither an alternative formula nor alternative figures. Again, in its amended answer to the 10th paragraph of the amended specification, the Respondent provided no alternative formula for the total amount of fringe benefit contribution payments due on behalf of each employee to each of the four contractual benefit funds. Finally, in its amended answer to the amended specification's 12th through 21st paragraphs, which detail the amounts owed to each of the 10 employees, the Respondent again failed to provide specific alternative supporting figures.[4] Ac-

[3] Chairman Hurtgen would deny the General Counsel's Motion for Summary Judgement as to the status of Elworthy and Pelletier. The General Counsel alleges that these two employees were glassworkers whose wages were unilaterally changed. The Respondent specifically denies that they were glassworkers. Chairman Hurtgen would allow the Respondent an opportunity to prove that Elworthy and Pelletier were not glassworkers. He would not require the Respondent to prove what they were. That is irrelevant. It is sufficient to assert that they were not glassworkers.

Sec. 102.56(b), on which his colleagues rely, deals with backpay figures. By contrast, the issue here is simply whether Elworthy and Pelletier were glassworkers. The Respondent's denial here fairly raised that issue.

[4] With respect to its amended answer to pars. 12, 14, 15, 17, 18, and 19, the Respondent points to some handwritten changes on the appendices to the amended specification. The Respondent neither explained these changes nor used them in alternative figures which were clearly explained. These changes therefore do no meet the requirements of

cordingly, we grant the General Counsel's Motion for Summary Judgment on these issues.

As to the status of Tritone, however, we shall deny the General Counsel's Motion for Summary Judgment and allow the parties to litigate this issue. The General Counsel alleges that Tritone was a glazier, that he should have been reinstated as a glazier, and that he was not so reinstated. The Respondent asserts that there was a legitimate basis for such nonreinstatement as a glazier, viz. that Tritone was physically unable to perform glazier work. We would give the Respondent an opportunity to prove this asserted fact.[5]

We disagree with our dissenting colleague on this matter. As noted above, the issue concerning employee Tritone is whether he should have been reinstated to a glazier position at glazier pay, as opposed to reinstatement to a lesser position at lower pay. The Respondent's answers to the original and amended compliance specifications said only that Tritone was "properly paid." We assume arguendo that this response was not sufficiently specific, i.e., it did not assert that Tritone was physically unable to perform glazier work. However, when the General Counsel moved for summary judgment on this basis, the Respondent timely responded with its specific defense, and attached thereto a letter of October 30, 1996, in which it specifically argued that Tritone could not physically perform glazier work. In these circumstances, we would not enter a default judgment against the Respondent and thereby deprive it of its right to litigate the issue.

We also agree with the General Counsel that the Respondent's affirmative defenses are without merit. The Respondent argues that the amended compliance specification should be dismissed in its entirety because of the delay in excess of 2 years between the date when the original compliance specification issued and the date the amended compliance specification issued. However, it is well established, that "laches may not defeat the action of a governmental agency in enforcing a public right," and, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Mid-State Ready Mix*, 316 NLRB 500 (1995), citing *Carrothers Construction Co.*, 274 NLRB 762, 763 (1985), and *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969).

The Respondent also argues that the amended specification fringe benefit contribution payments due on behalf of each employee to each of the four contractual benefit funds must be offset by the value of any alternative payments made by the Respondent. The Respondent further argues that the amended specification payments in this respect fail to benefit the employees, are unduly harsh on the Respondent, afford a windfall to the funds, and are punitive and inconsistent with the remedial purposes of the Act. However, it is well established that "[e]mployees have, in addiion to a stake in receiving benefits negotiated on their behalf by their chosen representatives, a clear economic stake in the viability of funds to which part of their compensation is remitted." *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), enf. denied in pertinent part 107 F.3d 882 (D.C. Cir. 1997). Moreover, the wrongdoing employer should not benefit by having at its disposal money which rightfully belonged to the contractual funds. Nor is the wrongdoing employer disadvantaged by receiving no offset for benefits provided through an employer sponsored alternative plan. Thus, "[A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . The company is merely required to repay what it has unlawfully withheld . . . [I]t was the company that unlawfully chose to incur the additional expense of a private insurance program." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983). See also *Banknote Corp. of America*, 327 NLRB 625 (1999).[6]

Sec. 102.56(b) of the Board's Rules and Regulations. *Baker Electric*, supra.

[5] Member Liebman would grant the General Counsel's Motion for Summary Judgment as to the status of Tritone. Tritone's job classification is within the Respondent's knowledge. In Member Liebman's view, it is not enough for the Respondent to generally deny that Tritone returned to work as a glazier. She would find no basis, in turn, for allowing the Respondent to seek to prove that Tritone was physically unable to perform glazier work. This contention was not raised in the Respondent's July 22, 1997 answer to the compliance specification and notice of hearing issued on July 1, 1997, or in the Respondent's February 10, 2000 answer to the amended compliance specification and notice of hearing issued on January 20, 2000. Rather, it was raised only in an October 30, 1996 letter from the Respondent's attorney. This assertion in a precompliance specification letter does not satisfy the requirements of Sec. 102.56 of the Board's Rules, supra.

[6] Chairman Hurtgen concurs. He does not pass on the validity of the D.C. Circuit's view in *Grondorf Field, Black & Co. v. NLRB*, supra. Assuming arguendo that the court's view is correct, there is no proffer of evidence showing an "improper windfall" here. That is, if there were a proffer of evidence showing that the Employer-Union plan provided no coverage to the employees during the period of the violation, a Board-ordered payment to the plan fund for that period would be, to that extent, a windfall to the fund. However, there is no such proffer of evidence, and thus there is no showing of the kind of windfall that concerned the court in *Grondorf*.

Contrary to his colleagues, Member Bartlett would permit the Respondent to present evidence at the compliance hearing, consistent with the D.C. Circuit's decision in *Grondorf, Field, Black & Co. v. NLRB*, supra, denying enf. of and remanding 318 NLRB 996 (1995), that its contributions to the contractual benefit funds should be reduced to avoid an improper windfall for those funds. Although the Board has not adopted the D.C. Circuit's view in *Grondorf*, allowing the Respondent to introduce such evidence into the record now would avoid a remand by the D.C. Circuit later, in the event the Respondent seeks court review of the

In sum, the Respondent's affirmative defenses are without merit, and we therefore grant the General Counsel's motion to strike them. In addition, the Respondent's amended answer to the designated paragraphs of the amended specification fails to comport with Board Rule 102.56(b). The General Counsel is therefore entitled to summary judgment on these matters under Board Rule 102.56(c). *Francis Building Corp.*, 330 NLRB No. 48 (1999) (not reported in Board volumes.)

ORDER

IT IS ORDERED that the Respondent's affirmative defenses are stricken.

IT IS ALSO ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted with respect to amended compliance specification paragraphs 1 through 10, and 12 through 21, relating to the backpay period and the backpay calculations for all the employees except as to the amount of interim earnings and expenses of each of the employees, and except as to the status of James Tritone.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 1 for the purpose of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning the paragraphs of the amended compliance specification as to which summary judgment was not granted.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all of the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Board's final decision. Further, a full factual record might assist the Board in evaluating whether to adopt the D.C. Circuit's view.